LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division

TOM C. CLARK II, Senior Counsel
THOMAS W. SWEGLE, Senior Lawyer
KATHRYN C. MACDONALD, Trial Attorney
Environmental Enforcement Section
1425 New York Avenue, N.W.
Washington, DC 20005

MARC HAWS
Assistant U.S. Attorney
District of Idaho
P.O. Box 32
Boise, ID 83707

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	No. 96-0122-N-EJL
Plaintiff,	No. 91-0342-N-EJL
v.	
ASARCO INCORPORATED, et. al,	
Defendants.	
and Consolidated Case.	

MEMORANDUM OF PLAINTIFF UNITED STATES OF AMERICA IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY OF DEFENDANT ASARCO

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INTRODUCTION

This is one of four motions for partial summary judgment the United States is filing today seeking determinations of liability under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. § 9607(a), for the costs of cleaning up lead, zinc, cadmium, and other hazardous substance contamination in the Coeur d'Alene River Basin ("Basin") released from the mining and mineral processing operations of the defendants and their predecessors.[1/] In the present motion, the United States seeks a ruling that ASARCO Inc. is jointly and severally liable for all costs incurred or to be incurred by the United States in responding to the releases and threatened releases of hazardous substances by ASARCO into the surface waters, sediments, and flood plain soils of the Basin, and the areas downstream where hazardous substances have come to be located.[2/] The United States also moves for partial summary judgment against ASARCO on

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[1/]For the purposes of these motions, the Basin consists of the South Fork of the Coeur d'Alene River and its tributaries, the Main Stem of the Coeur d'Alene River, the associated creek and river corridors (most importantly, their banks, flood plains, the wetlands, and lateral lakes along the main stem of the River), and Lake Coeur d'Alene. As so defined, the Basin excludes the North Fork of the Coeur d'Alene River.

[2/]In a consent decree entered November 14, 1994, the United States settled its claims against the defendants for response costs in the 21-square mile area around Kellogg and Smelterville known as the "Bunker Hill Superfund Site" or the "Box," "excluding any hazardous substances in the South Fork of the Coeur d'Alene River which flow into the Site." Accordingly, this motion seeks a determination of liability for response costs within the Box only to the extent the costs are for actions to address hazardous substances in the South Fork.

those elements of liability for natural resource damages under Section 107(a) of CERCLA that are the same as the elements of liability for response costs.[3/]

The undisputed evidence set forth in the accompanying Statement of Undisputed Material Facts ("SOF") establishes that ASARCO, its corporate predecessors, and other entities for which ASARCO is liable (collectively "ASARCO") owned and/or operated a number of mines, mills, and associated mining-related facilities on the South Fork of the Coeur d'Alene River (the "South Fork") and on several of its tributaries, including Canyon Creek, Milo Creek, and Lake Creek. As described more fully below, at least until the 1960s, ASARCO routinely dumped tailings laden with toxic metals directly into the waterways of the Basin and disposed of waste rock from its mines into dumps on the ground in a manner that allowed contaminated runoff to flow into the adjacent waterways. The tailings, contaminated runoff and erosion of the waste rock dumps, and contaminated water that discharged from mine openings were, and continue to be, carried downstream, leaving a trail of contamination in the sediments, on the flood plains, and in adjoining wetlands and lakes beginning at the upstream mines and mills and continuing all the way down the South Fork, the Main Stem Coeur d'Alene River, and into Lake

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[3/]The elements of liability for natural resource damages ("NRD") under CERCLA include all of the elements of liability for response costs addressed in this motion, except for the incurrence of response costs element, plus the additional element that releases of the type attributed to the defendant have "resulted in" injury to, destruction of, or loss of a natural resource. See 42 U.S.C. § 9607(a)(4)(C). Because the Court has dismissed the United States' NRD claim for areas outside the 21-square-mile Box, we presently seek a ruling on these NRD liability elements only with respect to claims within the Box. If the United States' NRD claims outside the Box are reinstated, however, we submit that the Court's rulings on the elements of liability under CERCLA Section 107(a) addressed in this motion will also apply to the reinstated NRD claims, thereby narrowing the issues for trial.

Coeur d'Alene.[4] For most of ASARCO's history in the Basin, none of these releases were authorized by a federal permit, and ASARCO is therefore not entitled to the "federally permitted release" defense under Section 107(j) of CERCLA, 42 U.S.C. § 9607(j).

As the set of motions filed today makes clear, ASARCO's practices were by no means unique in the Basin. Each of the other defendants is responsible for similar discharges of mill tailings and other hazardous substance releases from mines and mills on the South Fork or on tributary creeks that flow into the South Fork. The undisputed facts in this and the other motions filed today show that the releases from the other defendants' facilities left similar trails of contamination that overlap and commingle with the residue of ASARCO's operations. While the United States does not contend that any defendant is liable for contamination upstream of its facilities, or on a tributary where the defendant had no facility or waste disposal, the United States submits that each defendant is liable under CERCLA for response costs at the facilities that it owned or operated and at any area of contamination downstream of those facilities. Further, applying the standards for liability under CERCLA to these undisputed facts, in all areas where the trail of contamination from one defendant overlaps the trail from one or more of the other defendants, the Court should find each defendant jointly and severally liable with the others for all response costs.

Because there is no material factual dispute as to any of the elements of CERCLA liability, and because ASARCO has yet to establish facts sufficient to meet its burden of proving

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[4] Although there is evidence that contamination released from these mines and mills may contribute to elevated levels of toxic metals in the Spokane River, which flows out of Lake Coeur d'Alene, the area at issue in this motion does not extend beyond the Lake.

that the harm is divisible or to support any of the defenses permitted under CERCLA, the United States is entitled to summary judgment that ASARCO is liable for past and future response costs at or downstream of the facilities described herein.

STATEMENT OF FACTS

Pursuant to Rule 7.1(b)(2) of the Local Civil Rules of the United States District Court for the District of Idaho, this memorandum of law is accompanied by a separate Statement of Undisputed Material Facts as to which there can be no genuine issue ("Statement of Facts" or "SOF"), with specific references to supporting declarations, depositions, and other documentation. The mining-related properties in the Basin that were owned or operated by ASARCO or by its corporate predecessors, Federal Mining Company ("Federal") and Empire State-Idaho Mining and Development Company ("Empire"), include, but are not limited to: the Galena Mill located along Lake Creek; the Helena-Frisco Properties located along Canyon Creek; the Last Chance Properties located along Milo Creek;[5/] the Morning Properties located along the South Fork near Mullan; the Standard-Mammoth Mine located along Canyon Creek; the Standard Mill and Mammoth Mill located along South Fork near mouth of Canyon Creek; the Sweeney Mill located along South Fork; and the Tiger-Poorman Properties located along Canyon Creek. See Exhibit 1 to this memorandum for map of ASARCO's mining-related properties. Each of these mining-related properties may encompass one or more of the

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[5/]The Last Chance Properties and the Sweeney Mill are located within the Box, and as described above in footnote 2, the United States has settled its claims against the defendants for response costs inside the "Box." Thus, the United States is seeking summary judgment on ASARCO's liability arising from releases at the Last Chance Properties and Sweeney Mill only for (1) response costs incurred and to be incurred downstream of the Box and (2) elements of liability for NRD inside the Box.

following structures located within the same geographical area: a mine and its adits or other openings, a mill, tailings impoundments, and waste rock and tailings dumps. As set forth in the chart following Section II.A.3. below ("ASARCO's Facilities Chart"), the United States has listed each of these properties, including their supporting mining structures, as one functional facility. The United States is seeking summary judgment as to the liability of ASARCO for the costs incurred by the United States in responding to releases or threatened releases of hazardous substances from those ASARCO facilities listed in the chart below.

Since the late 1880s, extensive mining and milling operations, many of which were owned and operated by ASARCO or its predecessors, have disposed of and released at least 72 million tons of heavy-metal laden milling tailings directly into the River or a tributary which flows into the River. ASARCO's Motion for Partial Summary Judgment on Retroactivity, filed on September 4, 1998 ("ASARCO Retro. S.J."), Exh. 2 at 6. For example, ASARCO's mining operation at Morning Mine was one of the largest ore producers in the Basin, responsible for extracting over 13 million tons of ore between 1905-1958. SOF ¶ 97.

ASARCO's history in the Basin includes that of its predecessor, Federal, which was incorporated in 1903. SOF ¶ 15. Beginning in 1905, ASARCO owned a controlling interest in Federal. SOF ¶¶ 17-19. In 1953, Federal merged into ASARCO. SOF ¶ 20. ASARCO admits that it succeeded to the liabilities of Federal, as well as the liabilities of Federal's corporate predecessor, Empire, by the 1953 merger. SOF ¶ 21.

Moreover, ASARCO had a majority interest in, and controlled the activities of, the Mine Owners Association, which was formed in 1901 to purchase land or acquire property interests in lands from affected downstream property owners that allowed the mining companies to dispose

of tailings on their property. SOF ¶¶ 5, 157, 158-163. The Mine Owners Association presently owns several areas of contaminated land on the South Fork through an ASARCO subsidiary, Government Gulch Mining Company ("Government Gulch"), that serves as the Association's trustee. SOF ¶¶ 157, 159. ASARCO is liable for the ongoing releases and threatened releases of hazardous substances at these properties.

STATUTORY BACKGROUND

Congress enacted CERCLA in 1980 "to provide a comprehensive response to the problem of hazardous substance release." Wickland Oil Terminals v. ASARCO Inc., 792 F.2d 887, 890 (9th Cir. 1986); see also, United States v. Bestfoods, 524 U.S. 51, 55 (1998); Exxon Corp. v. Hunt, 475 U.S. 355, 359-60 (1986). As this Court has noted in previous litigation involving the Coeur d'Alene Basin, "CERCLA promotes the timely cleanup of inactive hazardous waste sites. It was designed to insure, as far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up." State of Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986). CERCLA provides the United States with a powerful array of tools to clean up hazardous waste sites promptly. For example, Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), authorizes the United States to respond to releases or threatened releases of hazardous substances into the environment. CERCLA also creates a Hazardous Substance Response Trust Fund, known as the Superfund, to finance federal response actions undertaken pursuant to Section 104(a) of CERCLA. 26 U.S.C. § 9507.

The Fund pays for response actions "where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation." Senate Comm. on Env't and

Public Works, S. Rep. No. 96-848, at 13 (1980), reprinted in 1 CERCLA Leg. Hist. at 305, 320 (1980). Congress intended that responsible parties, not the public, "bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator . . . ." Id. at 98, reprinted in 1 CERCLA Leg. Hist. at 405. Thus, Section 107 of CERCLA authorizes the government to recover its response costs from certain categories of responsible parties. The United States is obligated to ensure that the limited Superfund monies expended by the federal government in response to a release or threatened release of hazardous substances are recovered under provisions in Section 107 of CERCLA, wherever possible. See United States v. Northeastern Pharm. & Chem. Co., ("NEPACCO II"), 810 F.2d 726, 733 (8th Cir. 1986); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986).

To establish ASARCO's liability for response costs under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), the United States need only prove that:

(1) each mining-related property owned and/operated by ASARCO is a "facility";

(2) a "release" or "threatened release" of "hazardous substance" from the facility has occurred;

(3) the release or threatened release has caused the United States to incur response costs; and

(4) ASARCO falls within at least one of the four classes of responsible parties described in Section 9607(a).

Cose v. Getty Oil Co., 4 F.3d 700, 703-04 (9th Cir. 1993); 3550 Stevens Creek Assoc. v. Barclays Bank of California, 915 F.2d 1355, 1358 (9th Cir. 1990); Ascon Properties Inc. v.

Mobil Oil Co., 866 F.2d 1149, 1152-53 (9th Cir. 1989). As to the fourth element, the United States is contending in this motion that ASARCO is liable under both Section 107(a)(2) as a "person who at the time of disposal of any hazardous substance owned or operated a[ ] facility at which such hazardous substances were disposed of" (commonly referred to as "past owner/operator liability"), and Section 107(a)(1) as "the owner and operator of a . . . facility" (commonly referred to as "current owner/operator liability"). 42 U.S.C. § 9607(a)(1)&(2).

The standard of liability under Section 107(a) of CERCLA is strict. See e.g., 3550 Stevens Creek, 915 F.2d at 1357; State of Idaho v. Hanna Mining Co., 882 F.2d 392, 394 (9th Cir. 1989). Moreover, where hazardous substances attributable to more than one party are present, each party is jointly and severally liable for all response costs unless it can demonstrate that the harm is divisible or that there is a reasonable basis for apportionment of liability. United States v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988); O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989).

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) permits a court to enter summary judgment whenever the pleadings, depositions, answers to interrogatories, affidavits and admissions on file show that "there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); United States v. Andra, 923 F. Supp. 157, 158 (D. Idaho 1996). Not all genuine factual disputes, however, will prevent a finding of summary judgment. The disputed fact must also be material. A material fact is "one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." Manzanita Park, Inc. v. Insurance Co. of N.

Am., 857 F.2d 549, 552 (9th Cir. 1988) (citation omitted); accord Celotex Corp., 477 U.S. at 323 ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp., 477 U.S. at 321 (citation omitted); Manzanita Park, 857 F.2d at 552. However, "when the moving party has carried its burden . . ., its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). Although the Court will view the record in the light most favorable to the nonmoving party, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997), if the non-moving party's "evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted); Binder v. Gillespie, 184 F.3d 1059, 1067 (9th Cir. 1999) (citation omitted).

Because summary judgment is recognized to be a useful tool in resolving complicated CERCLA cases, courts routinely have granted partial summary judgment on liability under CERCLA. See e.g., United States v. Western Processing Co., Inc., 734 F. Supp. 930 (W.D. Wash. 1990) (granting summary judgment on liability of two generator defendants); United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989) (affirming summary judgment on liability of prior owners and operators); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989) ("Bifurcation and the use of summary judgment provide efficient approaches to these

[CERCLA] cases by narrowing the issues at each phase, by avoiding remedial questions if no liability attaches, and by potentially hastening remedial action or settlement discussions once liability is determined."). This practice furthers both the goals of the Federal Rules of Civil Procedure by securing "the just, speedy and inexpensive determination of every action," Celotex, 477 U.S. at 327 (citation omitted), and the goal of CERCLA to "facilitate the prompt cleanup of hazardous waste sites." R.W. Meyer, 889 F.2d at 1500 (citation omitted).

ARGUMENT

The undisputed material facts as set forth below establish that each of the elements of liability under Section 107 of CERCLA has been satisfied for ASARCO. Accordingly, ASARCO is liable for all past and future response costs incurred by the United States in the areas where hazardous substances released by ASARCO have come to be located in the Basin. Summary judgment as to liability is appropriate and will greatly facilitate any further litigation and trial by limiting the issues. A prompt ruling by the Court on liability also may facilitate settlement on the remainder of the issues.[6/]

[6/]In the event that the Court finds genuine issues of material fact as to any individual element of liability, the United States respectfully requests that the Court enter summary judgment as to all other elements that have been proven and describe in its ruling which issues remain to be tried. Such a ruling by this Court will narrow the scope of trial in this matter, thereby conserving the resources of this Court and of the parties, and may promote settlement discussions.

I. LIABILITY OF ASARCO FOR PREDECESSORS AND MINE OWNERS ASS'N

A. ASARCO Has Assumed the Liabilities of Federal.

As the admitted corporate successor to Federal (SOF ¶¶ 20, 21), ASARCO assumed Federal's liabilities under CERCLA. See Smith Land and Imp. Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988). Federal ceased to exist as a separate legal entity, and was merged into ASARCO in 1953.[7] SOF ¶ 22. In this merger agreement, ASARCO acquired all of Federal's assets, and provided an unequivocal and express assumption of all of its liabilities. See SOF ¶ 21 for exact language.

ASARCO admits that by virtue of its merger with Federal in 1953, it succeeded to the then-existing liabilities of Federal. SOF ¶ 21. Moreover, ASARCO's express assumption of liability also includes CERCLA liability even though the agreement predates the enactment of CERCLA in 1980. Courts, including the Ninth Circuit, have uniformly held that broadly worded assumptions of liability in pre-CERCLA agreements encompass CERCLA liability. See e.g., Jones-Hamilton v. Beazer Materials & Services, Inc., 973 F.2d 688, 692-93 (9th Cir. 1992) (indemnity agreement from 1970); Hatco Corp. v. W.R. Grace & Co.-- Conn., 59 F.3d 400, 405 (3d Cir. 1995); Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10, 12-13 (2d Cir. 1993) (1973-74 agreements require indemnification for CERCLA liability). ASARCO's merger with Federal, and its unequivocal and express assumption of all of Federal's liabilities, lead to a clear

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[7]The Federal Mining Company that merged into ASARCO was organized in 1903. SOF ¶ 15. After the merger, Federal was dissolved and a new company, called Federal Mining and Smelting Company, Inc., was created for the purpose of holding the name in which ASARCO owned all the stock. SOF ¶ 22. The new Federal held no property, undertook no operations, held no assets, and was dissolved in 1995. SOF ¶ 22.

result under CERCLA - ASARCO is liable as the corporate successor to Federal for Federal's mining and milling activities in the Basin.

B. **ASARCO is Responsible for the Liabilities of Empire.**

ASARCO is also liable as the corporate successor to Empire. Empire owned and operated the Tiger-Poorman Mine and Mill between 1900 and 1903, and the Last Chance Mine and Mill and Sweeney Mill between the late 1890s and 1903, and disposed of hazardous substances at these sites. SOF ¶¶ 113-114, 120, 135-136, 140, 144. In 1903, Empire became Federal, and Federal assumed all of Empire's assets and liabilities. SOF ¶ 15. ASARCO testified that "Federal . . . was formed around the Empire . . .. Empire State's management became Federal's management. Empire . . . ceased to exist. So ASARCO would concede that Empire State became Federal Mining." SOF ¶ 15. By virtue of ASARCO's merger with Federal in 1953, ASARCO became a successor to the liabilities of Empire, the predecessor to Federal.

C. **ASARCO is Responsible for the Liabilities of the Mine Owners Association.**

The Mine Owners Association ("MOA"), an unincorporated group of mining companies within the Basin that originally included Empire, and later Federal and ASARCO, was formed in November 1901, to acquire land and other interests in land that had been damaged by the mining companies' disposal of tailings into the creeks and rivers in the Basin. SOF ¶¶ 157, 162. Landowners along the River sued or were threatening to sue the mining companies for damage caused to their property as the tailings migrated downstream and overflowed onto their lands. SOF ¶¶ 162-163. The Mine Owners Association was not, and was never intended to be, an independent entity. SOF ¶ 159. ASARCO has testified that the Mine Owners Association is an

"unincorporated association" operating under a trust agreement whereby (1) a "naked" trustee was appointed for the sole purpose of holding title to various lands for the use and benefit of the mining company beneficiaries, (2) apart from the trustee, the Association had no officers or directors of its own, and (3) all MOA decisions were made by majority vote, which, in turn, was based upon monetary contributions by each mining company to the Association. SOF ¶¶ 157, 159-160.

The Mine Owners Association, through its trustee, Government Gulch Mining Company, is the current owner of the Cataldo Flats, an area contaminated by decades of tailings disposal. SOF ¶¶ 183, 186-186, 188.[8/] ASARCO is liable for all actions of the Mine Owners Association by virtue of its express assumption of liabilities under the original trust agreement. SOF ¶ 163. ASARCO has testified that the 1901 trust agreement still controls the actions of the Mine Owners Association today. SOF ¶ 157. Under the agreement, the members of the Mine Owners Association – five of whom became part of Federal (and ultimately ASARCO) by purchase or merger – agreed to assume the liabilities of the trustee for, among other things, "all costs, damages, expenses, and charges of every kind and nature incurred by [the trustee] of themselves, through, or as a result of this agreement, or connected in any manner with the subject matter hereof . . .". SOF ¶¶ 158, 163.

[8/]For the purposes of this motion, the United States will address only the Cataldo Flats. The MOA is also the owner of 539.9 acres of land in Shoshone County and 2,628.1 acres in Kootenai County. The MOA owns an undivided 50% interest in an additional 320 acres in Shoshone County. Though not at issue in this motion, some of those lands are also contaminated by mine wastes.

Moreover, ASARCO is liable as an "operator" of the Cataldo Flats property, having actively participated in and exercised complete practical control over the operations of the Mine Owners Association. See Bestfoods, 524 U.S. at 55 (addressing the potential liability of a corporate parent for a facility owned by its subsidiary). From about 1905 to today, Federal and ASARCO have controlled a majority voting interest in the Mine Owners Association. SOF ¶ 158. ASARCO admits that the mining company beneficiaries made the decisions of the Mine Owners Association regarding the purchase, sale and management of lands, and other expenditures, SOF ¶¶ 159-160, and that the MOA trustee neither made nor had the power to make any such decisions. SOF ¶ 159. In all actions, the trustee was directed by the vote of the MOA members; a vote controlled for the past 95 years by ASARCO. SOF ¶¶ 158-160.

In sum, ASARCO stands in the shoes of Federal, Empire, and the Mine Owners Association for CERCLA liability arising from each entity's ownership or operation of facilities, as described below.

II. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT AS TO THE ELEMENTS OF CERCLA LIABILITY FOR RESPONSE COSTS

The United States is contending that ASARCO is liable as a past owner and/or operator of facilities at the time of disposal of hazardous substances at such facilities under Section 107(a)(2) of CERCLA, and as a current owner of facilities from which releases of hazardous substances have occurred under Section 107(a)(1) of CERCLA. As shown below, each of the elements of liability is established by the undisputed facts for all of the ASARCO facilities listed in the chart below.

A. **ASARCO Is Liable as Past Owner and/or Operator Under Section 107(a)(2) of CERCLA**.

1. **Each Mining-Related Property Is a "Facility" Under CERCLA.**

Section 101(9) of CERCLA defines "facility" as "(A) any building, structure, installation, equipment, pipe . . . well, pit, pond . . . or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . .." 42 U.S.C. § 9601(9). "Facility" includes every conceivable place where hazardous substances come to be located. 3550 Stevens Creek, 915 F.2d at 1360; United States v. Shell Oil Co., 841 F. Supp. 962, 969 (C.D. Cal. 1993). Moreover, there is no requirement that a facility must be defined by the owner's property line. Louisiana-Pacific Corp. v. Beazer Materials & Services, Inc., 811 F. Supp. 1421, 1431 (E.D. Cal. 1993); United States v. Stringfellow, 661 F. Supp. 1053, 1059 (C.D. Cal. 1987).

Each mining-related property owned and/or operated by ASARCO and each area where hazardous substances have come to be located is a "facility" under CERCLA. ASARCO's mining-related facilities in the Basin often encompassed many structures which functioned together in the same geographical area to operate and support mining operations, including a mine and its adits or other openings, a mill, tailings impoundments, and waste rock or tailings dumps. While each of these structures within a mining-related property meets the broad definition of facility under CERCLA, it is more appropriate for purposes of evaluating liability to consider each mining-related property as a whole, including all of the mining and milling-related structures on it. See Axel Johnson, Inc. v. Carroll Carolina Oil Company, Inc., 191 F.3d 409, 417-19 (4th Cir. 1999) (holding that entire contaminated thirteen acre refinery property

operated by defendant was one "facility," and rejecting defendant's argument that each tank and spill area on the property for which it was not responsible was a separate facility under CERCLA); United States v. Township of Brighton, 153 F.3d 307, 312-13, 322-23 (6th Cir. 1998) (holding entire 15 acre dumpsite is a single "facility," rejecting municipality's attempt to confine its responsibility to a single portion of the entire contaminated dump). At the end of Section II.A.3. below, the United States has included a chart identifying the mining-related facilities at which ASARCO disposed of or placed hazardous substances and as to which the United States is seeking summary judgment.

2. **Tailings, Waste Rock, and Mine Drainage Are All Hazardous Substances.**

ASARCO has admitted that the tailings, waste rock, and mine drainage found in the Coeur d'Alene Basin at each of the facilities listed in the chart below, contain lead, zinc, and cadmium. SOF ¶¶ 3, 11, 13. Each of these metals appears on the list of hazardous substances set forth at 40 C.F.R. § 302.4 (Table), and thus is a "hazardous substance" within the meaning of Section 101(14) of CERCLA. 42 U.S.C. § 9601(14).

Because these tailings, waste rocks, and mine discharges contain hazardous substances (i.e., lead, zinc, cadmium), they are also "hazardous substances" under CERCLA. See e.g., United States v. Alcan Aluminum Corp. ("Alcan-Butler Tunnel"), 964 F.2d 252, 259-63 (3d Cir. 1992) (holding a mineral oil emulsion containing trace amounts of cadmium, chromium, copper, lead, and zinc was itself a "hazardous substance"); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1201 (2d Cir. 1992) (holding the mixture of hazardous substances with municipal waste as a "hazardous substance" because "[w]hen a mixture or waste solution contains hazardous

substances, that mixture is itself hazardous for purposes of determining CERCLA liability."); City of New York v. Exxon Corp., 744 F. Supp. 474, 489-90 (S.D. N.Y. 1990), aff'd on reh'g, City of New York v. Exxon Corp., 766 F. Supp. 177, 190 (S.D. N.Y. 1991) ("Because . . . waste oil emulsion contained hazardous material, the emulsion is a hazardous substance under CERCLA").[9]

Moreover, this Court has held that these same types of mining wastes produced by the Bunker Hill Company in the Basin are "hazardous substances" within the meaning of CERCLA. Bunker Hill, 635 F. Supp. at 673, citing, e.g., Eagle-Picher Industries, Inc. v. U.S. EPA, 759 F.2d 922, 927 (D.C. Cir. 1985); accord, State of Idaho v. Hanna Mining Co., 699 F. Supp. 827, 833 (D. Idaho 1987), aff'd, 882 F.2d 392 (9th Cir. 1989). In short, hazardous substances have been deposited, disposed of, placed, or come to be located at each of the mining-related properties, including, among others, cadmium, lead, and zinc. SOF ¶¶ 41, 48, 50, 62, 64, 81, 85, 99, 101, 105, 109, 126, 131, 148, 153-156. Each mining-related property is therefore a "facility" within the CERCLA definition. Furthermore, each area where hazardous substances released from these facilities have come to be located is also a "facility." 3550 Stevens Creek, 915 F.2d at 1360.

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[9] See also A & W Smelter and Refiners, Inc. v. Clinton, 146 F.3d 1107, 1110 (9th Cir. 1998)(noting that "we see no basis for parting company" from the "Second, Third and Fifth Circuits . . . [which] all agree that CERCLA's definition of 'hazardous substances' has no minimum level requirement.").

3. ASARCO Is Directly Liable Under Section 107(a)(2) of CERCLA as a Former Owner and Operator of Mines and Mill Sites at the Time of Disposal of Hazardous Substances.

Section 107(a)(2) of CERCLA imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . ." 42 U.S.C. § 9607(a)(2). ASARCO is a corporation, and therefore a "person" within the meaning of this Section. See 42 U.S.C. § 9601 (21).

CERCLA defines "disposal" by incorporating the definition provided in the Solid Waste Disposal Act ("SWDA"). See 42 U.S.C. § 9601(29). The SWDA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3).

The primary disposals that occurred at ASARCO's mining-related facilities fall into three categories: (1) the dumping of tailings directly into the South Fork or its tributaries;[10/] (2) the deposit of waste rock and tailings directly on the ground;[11/] and (3) the discharging of water from

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[10/]The practice of dumping tailings directly into the River began in the late 1800s and continued until the late 1960s. ASARCO then disposed of its tailings into unlined ponds or impoundments. SOF ¶¶ 4-7.

[11/]Waste rock is material removed from a mine that was not processed either because the rock lacked sufficient metal content to warrant further processing or the metals were too difficult to extract given the mining technology available at that time. SOF ¶ 11. This waste rock was disposed into unlined dumps located at the mine tunnel openings, or near shafts. SOF ¶ 11.

the underground mine workings.[12] See United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1541-42 (E.D. Cal. 1992) ("creation of tailings piles" and mine discharges constitute disposals); Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp., 976 F.2d 1338, 1342 (9th Cir. 1992) (the excavation and then subsequent spreading of tainted soil over uncontaminated portions of the property constitutes "disposal"); American Mining Congress v. U.S. EPA, 824 F.2d 1177, 1191 & n.20 (D.C. Cir. 1987) (the leaching of toxic metals from mining waste piles into a creek has been held to be a "clear example of waste disposal" under the SWDA).

The most prevalent "disposal" in the Basin, in terms of volume and resulting impact, was ASARCO's and the other defendants' dumping of million of tons of metal-laden tailings directly into the South Fork and associated tributaries between the 1880s and late 1960s. SOF ¶¶ 3-4. Tailings are a waste product from the milling process, and are composed of finely ground waste rock containing fractions of metals (including lead, zinc, and cadmium) not recovered during milling of ore. SOF ¶ 2-3. As a result, River and Lake bed sediments in the Basin contain high concentrations of toxic metals, including zinc and lead. Statement of Material Facts Not Genuinely Disputed in Support of Plaintiff's Motion for Partial Summary Judgment Against Defendants Coeur d'Alene Mines Corporation and Callahan Mining Corporation (hereafter "Coeur SOF") ¶¶ 4, 6, 7, 10, 35-39.

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[12] Water, including water from rain, snow, surface runoff, groundwater, and the mines, enters and flows across underground mine workings through raises, tunnels, portals, adits, and any other openings, picking up metals. SOF ¶ 13. The accumulated water was then pumped or otherwise discharged through and out of the underground excavations from which it leached into groundwater and/or flowed out of the mine into the Coeur d'Alene River or its tributaries. SOF ¶ 13.

ASARCO, including its predecessors, Federal and Empire, owned and/or operated each of the facilities listed below.[13/] The chart sets forth the years in which ASARCO and its predecessors owned and/or operated each facility, the types of disposals that occurred at each facility when ASARCO and its predecessors owned and/or operated it, and includes citations to the accompanying SOF. Accordingly, ASARCO is liable for the costs incurred by the United States in responding to the releases or threatened releases from these facilities owned and operated by ASARCO.

Facility	**Owner**	**Operator**	**Types of Disposal**
Cataldo Flats Property	1932- present ASARCO, Hecla, and other mining companies through the MOA, Government Gulch, and Dredge Fund (SOF ¶¶ 166, 183-184, 188)	1932-1968 ASARCO through the MOA and the Dredge Fund (SOF ¶¶ 182, 187)	disposal of dredging spoils including tailings onto land (SOF ¶¶ 183, 185-186)
Galena Mill (located along Lake Creek) (SOF ¶ 53)	1954-1956 ASARCO (SOF ¶¶ 58-59)	1954-1956 ASARCO 1956-1992 ASARCO operated Mill under lease agreement. (SOF ¶¶ 59-61)	1926-1954 dumping tailings into Lake Creek (SOF ¶¶ 62-65) 1954-10/68 dumping tailings into Lake Creek and surrounding soils (SOF ¶ 66)

[13/]The United States is only seeking summary judgment as to certain facilities owned and/or operated by ASARCO, and only as to a subset of the hazardous substance releases that have occurred at those facilities. The United States has evidence demonstrating that ASARCO is liable for response costs as to other facilities and additional releases in the Basin, which the United States intends to present at trial.

Facility	Owner	Operator	Types of Disposal
Helena-Frisco Properties:			
Helena-Frisco Mine (located along Canyon Creek) (SOF ¶ 68)	1913-1953 Federal 1953-1967 ASARCO (SOF ¶¶ 72, 75)	1915-1953 Federal 1953-1956 ASARCO 1957-1967 ASARCO leased portions of Mine to others to operate (SOF ¶¶ 73, 75)	discharging of mine water (SOF ¶ 85)
Helena-Frisco Mill (also Frisco Mill and Black Bear Mill) (located along Canyon Creek) (SOF ¶ 71)	1913-1917 Federal (SOF ¶ 77)	1914-1917 Federal (SOF ¶ 78)	dumping of tailings into surrounding soils and waterways including Canyon Creek (SOF ¶ 82)
Last Chance Properties:			
Last Chance Mine (located along Milo Creek) (SOF ¶ 132)	late 1890s-1903 Empire 1903-1918 Federal (SOF ¶¶ 135-137)	late 1890s-1903 Empire 1903-1918 Federal operated and leased portions to others to mine (SOF ¶¶ 135, 138-139)	discharging of mine water (SOF ¶ 156)
Last Chance Mill (located along Milo Creek) (SOF ¶ 134)	late 1890s-1903 Empire 1903-1918 Federal (SOF ¶ 144)	late 1890s-1903 Empire 1903-1918 Federal (SOF ¶ 144)	dumping of tailings into Milo Creek (SOF ¶¶ 145-149)

Facility	Owner	Operator	Types of Disposal
Sweeney Mill (located along South Fork) (SOF ¶ 133)	1901-1903 Empire 1903-1918 Federal (SOF ¶ 140)	1901-1903 Empire 1903-1918 Federal (SOF ¶¶ 140, 142)	dumping of jig tailings into riparian area between South Fork and railroad tracks (via pipe) (SOF ¶ 150) dumping of flotation tailings and slimes into Government Creek (SOF ¶ 150) disposing of tailings into dumps (SOF ¶ 151)

Facility	Owner	Operator	Types of Disposal
Morning Properties:			
Morning Mine (located along South Fork) (SOF ¶ 86)	1905-1953 Federal 1953-1966 ASARCO (SOF ¶¶ 89, 91)	1905-1953 Federal 1953-1957 ASARCO (SOF ¶¶ 89, 96-98) 1905-1966 Federal and, after 1953, ASARCO leased other portions of Mine to various entities to operate (SOF ¶¶ 90-91)	discharging of mine water (SOF ¶ 109) disposing of waste rock into dumps (SOF ¶¶ 105)
Morning Mill (Second) (located on portal of No. 6 Level near South Fork) (SOF ¶ 88)	1905-1953 Federal 1953-1957 ASARCO (SOF ¶¶ 46, 57, 76, 96)	1906-1953 Federal 1953-1957 ASARCO (SOF ¶¶ 92-94, 98)	dumping tailings into South Fork (SOF ¶¶ 46, 99-103) disposing of tailings into two dumps on banks of South Fork (SOF ¶ 100)
Standard-Mammoth Mine (located along Canyon Creek) (SOF ¶ 26)	1912-1953 Federal 1953-present ASARCO (SOF ¶¶ 29-30)	1903-1912 Federal 1912-1966 Federal and, after 1953, ASARCO leased Mine to other entities to operate (SOF ¶¶ 31, 32, 38-39)	discharging of mine water (SOF ¶¶ 49-50) disposing of waste rock into dumps (SOF ¶¶ 47-48)
Standard Mill (Mace Mill No. 2) (located along South Fork close to mouth of Canyon Creek) (SOF ¶ 28)	1903-1953 Federal 1953-present ASARCO (SOF ¶¶ 33-34)	1903-1912 Federal 1912-1917 Federal leased Mill to Green Hill-Cleveland Mining Company to operate (SOF ¶¶ 35-36)	dumping tailings into Canyon Creek (SOF ¶¶ 41-46)

Facility	Owner	Operator	Types of Disposal
Mammoth Mill (Mace Mill No. 2) (located along South Fork close to mouth of Canyon Creek) (SOF ¶ 28)	1903-1953 Federal 1953-present ASARCO (SOF ¶¶ 33-34)	1903-1912 Federal 1912-1916 Federal leased Mill to Stewart Mining Company to operate (SOF ¶¶ 35, 37)	dumping tailings into Canyon Creek (SOF ¶¶ 41-45)
Tiger-Poorman Properties:			
Tiger-Poorman Mine (located along Canyon Creek) (SOF ¶ 111)	1900-1903 Empire 1903-1920 Federal (SOF ¶¶ 113-115)	1900-1903 Empire 1903-1909 Federal 1910-1920 Federal leased Mine to other entities to operate (SOF ¶¶ 113-118, 120)	discharging of mine water (SOF ¶¶ 130-131)
Tiger-Poorman Mill (located along Canyon Creek) (SOF ¶ 112)	1901-1903 Empire 1903-1912 Federal (SOF ¶¶ 120-121)	1901-1903 Empire 1903-1909 Federal 1909-1911 Federal leased Mill to another entity to operate (SOF ¶¶ 120, 123)	dumping of tailings into surrounding soils and waterways, including Canyon Creek (SOF ¶¶ 124-129)

4. **Hazardous Substances Have Been and Continue to be Released From Each of These Facilities.**

a. There Have Been Releases of Hazardous Substances From Each of ASARCO's Mining-Related Facilities

CERCLA defines "release" to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the

environment."[14] 42 U.S.C. § 9601(22). Simply stated, a "release" is *any* introduction of hazardous substances into the environment.[15] A release includes, for example, the spread of windblown mineralized particles from an ore pile, A & W Smelter, 146 F.3d at 1111; see also United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1149 (D. Ariz. 1984) (transport by wind of asbestos from tailings piles found to be a release and a continuing threat of release), and the leaking of hazardous substances from tanks, pipelines, drums or other containers, State of New York v. Shore Realty, 759 F.2d 1032, 1045 (2nd Cir. 1985).

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[14]The term "environment" is defined under CERCLA as "surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air." 42 U.S.C. § 9601(8).

[15]The United States only needs to show the presence of hazardous substances in the soil, surface water, or groundwater of a site in order to demonstrate that a "release" has occurred. See Lincoln Properties, Ltd. v. Higgins, 36 ERC 1228, 1245 (E.D. Cal. 1993); United States v. Hardage, 761 F. Supp. 1501, 1510 (W.D. Okla. 1990); United States v. Northernaire Plating Co., 670 F. Supp. 742, 746-47 (W.D. Mich. 1987), aff'd, 889 F.2d 1497 (6th Cir. 1989). The amount of a hazardous substance released into the environment is not relevant to liability, and the release need not be above any specific quantity. Stewman v. Mid-South Wood Products of Mena, Inc., 993 F.2d 646, 649 (8th Cir. 1993) ("there is no minimum quantitative requirement to establish a release or threat of a release of a hazardous substance under CERCLA").

Moreover, the United States is not required to "trace" or "fingerprint" any of the hazardous substances released to any particular source of defendant. See Nurad, Incorporated v. William E. Hooper & Sons Company, 966 F.2d 837, 846 (4th Cir. 1992); Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 663-64 (E.D. Cal. 1990); see also Monsanto Co., 858 F.2d at 170; Lincoln Properties, Ltd., 823 F. Supp. at 1536. "[T]o require a plaintiff to 'fingerprint' wastes is to eviscerate the statute." United States v. Wade, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983). Nor is it necessary to allege the particular manner in which a release occurred in order to make a prima facie claim. Ascon Properties, 866 F.2d at 1153. In designing CERCLA, Congress was well aware of the "synergistic and migratory" capacities of hazardous substances and of the "technological infeasibility of tracing improperly disposed waste to its source." Monsanto Co., 858 F.2d at 170 (quoting Wade, 577 F. Supp. at 1332). With this in mind, Congress chose to impose a strict liability regime where the trigger of liability is mere ownership and operation, "not culpability or responsibility for the contamination." Nurad, 966 F.2d at 846.

Courts have held that the term "release" includes not only active dumping, but also migrating or leaching of hazardous substances. See e.g., Shore Realty, 759 F.2d at 1045 (release includes "the continuing leaching and seepage from the earlier spills"); Emhart Industries, Inc. v. Duracell Int'l, Inc., 665 F. Supp. 549, 574 (M.D. Tenn. 1987) (same); Shell Oil, 841 F. Supp. at 969 (releases include (1) ongoing seeps of acid sludge migrating through the soil cover to the surface; (2) once the sludge breaks the ground surface, benzene, toluene, xylene, and hydrogen sulfide are released into the atmosphere; and (3) sludge migrating through strata of soil in base of unlined pit, and into groundwater).

In particular, the District Court of Colorado has held that leaching and migration resulting from mining activities constitute a release within the meaning of CERCLA in a case very similar to the present one. State of Colorado v. Idarado Mining Company, 707 F. Supp. 1227, 1241 (D. Colo. 1989), rev'd in part on other grounds, 916 F.2d 1486 (10th Cir. 1990). In holding a successor mining company liable for the acts of a predecessor company, which was a prior owner and operator, the Court found the following instances are releases actionable under CERCLA: (1) tailings were "released" into a river "and ultimately settled . . . behind the dams and in the river's sediments" and (2) the past and continual erosion of tailings piles into the River, noting that "[t]his erosion releases heavy metals into the waters and sediments." Id.

In the present case, each of the types of disposal discussed above and set forth in ASARCO's Facilities Chart - - dumping of tailings into surface water, disposing of waste rock and tailings in uncontained piles, and discharging of mine water - - constitutes a "release" of hazardous substances under CERCLA. In addition, the uncontested evidence in this case

establishes that there have also been many other types of releases of hazardous substances into the environment at the facilities owned and/or operated by ASARCO. These include:

- Water from snow melt and rain runs through waste rock dumps, leaching hazardous metals from the waste rock, and then drains into nearby creeks and rivers. For example, at the Standard-Mammoth Mine, water containing elevated levels of zinc seeps continuously out of the ground at the downhill edge of the tailings dumps located at Standard Mammoth No. 5 adit and at the Campbell tunnel, and runs into Canyon Creek. SOF ¶¶ 47-48. Water containing hazardous substances discharges from other waste rock and tailings dumps owned by ASARCO. See SOF ¶¶104-108, 151, 153-155.

- Disposing dredge spoils, consisting of metal-laden tailings and alluvial river sediment extracted from the River bottom by a dredge operated and maintained by the MOA, onto an area known as the Cataldo Flats. The dredge operated between 1932 and 1968, and disposed of a total of more than 31 million tons of tailings and river sediments onto the Cataldo Flats. In fact, the amount of property at the Flats ultimately covered by tailings exceeded 500 acres at depths ranging up to thirty feet. SOF ¶¶ 181-188.

- As a result of occasional flooding events in the Basin, the Osburn tailings dam[16] failed partially or completely, causing tailings to fall directly into the River or Basin. For example, in 1917, a flood breached the Osburn tailings dam, causing a large amount of tailings to be washed downstream. SOF ¶¶ 103, 192.

b. Hazardous Substances Released By ASARCO Have Been Transported and Deposited Throughout All Areas Downstream of the Release in the Basin.

The tailings released by ASARCO into rivers in the Basin did not simply sink to the bottom of the river and remain at the location they were discharged. Most of these tailings were carried by the river waters and spread throughout the Basin downgradient of the point of release.

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[16]The Osburn tailing dam owned and operated by the Mine Owners Association was a wooden timber structure placed across the Coeur d'Alene River to trap tailings as they move downstream from the mills. The tailings settled in the calmer waters behind the dams. SOF ¶ 167.

Through natural processes the tailings become mixed with native alluvium, are deposited on the flood plain and in the bed and banks of streams and lakes, and are remobilized by seasonal high water and floods and then redeposited further downstream. Coeur SOF ¶¶ 6, 17-18. Hazardous substances released from waste rock dumps, adit discharges and tailings dumped on the flood plains are likewise carried to all downstream areas in the Basin. Coeur SOF ¶¶ 20-21.

Defendants' own expert has admitted in detail that the mining-related hazardous substances released into the environment by ASARCO and other companies have been spread widely and come to be located throughout the Coeur d'Alene Basin.[17] In his Expert Report, defendants' expert Steven Werner cataloged the tailings and other mine wastes found in each stretch of the South Fork, its tributaries Canyon and Ninemile Creeks, the Coeur d'Alene River, the lateral lakes and wetlands adjacent to the River, and Lake Coeur d'Alene that were released by the mining companies. Coeur SOF ¶¶ 25-39. For example, in the Upper Basin area of the South Fork, Werner identified unconsolidated jig tailings in Ninemile and Canyon Creeks near mining sites and unconsolidated tailings which have been transported downstream in these creeks to lower flood plain areas. Coeur SOF ¶ 25. Werner also noted the presence of large amounts of waste rock and numerous adit and seep discharges in these two creeks. Coeur SOF ¶ 25. In the lower Basin, Werner admits that lead concentrations in sediments of three of the lateral lakes, Black, Anderson, and Swan Lakes, exceed 5,000 parts per million, that lead

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[17] The United States cites portions of defendants' experts' reports solely for the purpose of presenting admissions by these experts relevant to defendants' liability. The United States does not otherwise intend to endorse the validity and accuracy of the conclusions or findings of the defendants' experts. In fact, the United States contends that their conclusions or findings oversimplify or underestimate the extent of contamination for which the defendants are liable and the actions needed to address contamination in the Basin.

concentrations in sediment exceed 1,000 ppm throughout most of the flood plain, that the Coeur d'Alene Lake Bed has elevated metals levels from mining sources, and the Coeur d'Alene River bed and banks are widely contaminated with tailings. Coeur SOF ¶¶ 30-39.

Defendants' expert Werner also admits that mining-related hazardous substances continue to contaminate surface waters throughout the Basin. Werner states that although natural mineralization contributes to in-stream metals concentrations, the majority of Upper Basin metals loading to surface water is from tailings, waste rock, and mine water discharges. Coeur SOF ¶ 40. Werner also states that increases in lead loading along the Coeur d'Alene River occur during both high and low river flows, suggesting that constant loading is occurring from either erosion from contaminated river banks and/or remobilization of contaminants in river beds. Coeur SOF ¶ 34.

B. ASARCO Is Directly Liable as a Current Owner of the Cataldo Flats Under Section 107(a)(1) of CERCLA.

To establish liability under Section 107(a)(1) of CERCLA, the United States must also demonstrate that ASARCO is "the owner and operator of . . . a facility . . . from which there is a release, or a threatened release . . . of hazardous substances . . .." 42 U.S.C. § 9607(a)(1). It is well established that current owners -- whether or not they disposed of or handled the hazardous substances being released -- are liable under CERCLA. See e.g., Stringfellow, 661 F. Supp. at 1063 (granting summary judgment imposing liability on the current owner because CERCLA "does not require that the present owner contribute to the release, but merely that he is the present owner of the facility where there has been a release or threat of release of a hazardous substance."); Monsanto Co., 858 F.2d at 168; Shore Realty, 759 F.2d at 1043-45; Weyerhaeuser

Corp. v. Koppers Co., Inc., 771 F. Supp. 1406, 1416 (D. Md. 1991) (owner/lessor liable for releases caused by lessee).

ASARCO has expressly assumed the liabilities of the Mine Owners Association, the current owner of Cataldo Flats, at which there is a release or threatened release of hazardous substances. SOF ¶¶ 163, 188. As the successor trustee of the Mine Owners Association since 1991, Government Gulch holds the legal title for the Cataldo Flats facility. SOF ¶¶ 166, 188. Moreover, since 1905, ASARCO and its predecessors have always controlled the activities of the Mine Owners Association, holding a majority voting interest in the MOA, and controlling the management decisions thereof. SOF ¶¶ 158-160.

C. The United States Has Incurred Response Costs in Connection with the Releases and Threatened Releases of Hazardous Substances From ASARCO's Mining-Related Facilities.

The final element of liability under Sections 107(a)(1) and (a)(2) of CERCLA is that the release or threatened release of hazardous substances caused the incurrence of response costs. Response costs include, inter alia, the costs of investigations, clean-up, sampling, overseeing contractor of responsible party work, security fencing and other restrictive measures, and enforcement activities. 42 U.S.C. § 9601(25); Cadillac Fairview/ California, Inc. v. Dow Chemical Co., 840 F.2d 691, 695 (9th Cir. 1988); Wickland Oil Terminals, 792 F.2d at 892. To establish liability, the United States need only prove that some amount of response costs has been incurred in response to a release or threatened release of a hazardous substance.[18/] Western

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[18/]For purposes of establishing liability, it is not necessary for the United States to quantify its costs in this motion. See e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150-51 (1st Cir. 1989) (listing elements of liability and distinguishing liability from amount of recoverable costs; United States v. Mottolo, 695 F. Supp. 615, 630 (D. N.H. 1988)

Processing Co., 734 F. Supp. at 936-37; United States v. Kramer, 757 F. Supp. 397, 417 (D. N.J. 1991). Furthermore, the United States need not establish that a particular defendant caused the release leading to the incurrence of response costs. See United States v. Alcan Aluminum Corp. ("Alcan-PAS"), 990 F.2d 711, 721 (2d Cir. 1993).

It is beyond dispute that releases of hazardous substances at facilities owned and operated by ASARCO in the Coeur d'Alene Basin, and in downstream areas where ASARCO's wastes are present, have caused the United States to perform investigations of the environmental conditions in the Basin, and thus to incur substantial response costs in responding to releases. The United States respectfully refers the Court to the attached Declaration of Mary Jane Nearman for an overview of the EPA's response activities at ASARCO's mining-related facilities throughout the Basin, and the associated response costs. See SOF ¶ 193, Attach. 16.

III. ASARCO IS JOINTLY AND SEVERALLY LIABLE FOR ITS MINING-RELATED RELEASES OF HAZARDOUS SUBSTANCES

In multi-party CERCLA cases in which the defendants' releases of hazardous substances have caused indivisible environmental harm, each of those parties should be held jointly and severally liable for the entire harm. Alcan-Butler Tunnel, 964 F.2d at 268-69; O'Neil, 883 F.2d at 178-79; Monsanto Co., 858 F.2d at 172; Western Processing Co., 734 F. Supp. at 942; see also United States v. Montrose Chemical Corp., 104 F.3d 1507, 1518-19, n.9 (9th Cir. 1997). All parties who are responsible for any hazardous substances at a site are jointly and severally liable

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("Liability hinges on whether plaintiffs incurred *any* response costs") (emphasis in original). Likewise, whether the costs incurred were inconsistent with the National Contingency Plan ("NCP") is not an issue relevant to liability, but only to the amount of costs. Stringfellow, 661 F. Supp. at 1062; see Cadillac Fairview, 840 F.2d at 695. The amount of costs incurred and the consistency of such costs with the NCP are reserved for later stages of this litigation.

unless they can prove that distinct harms at the site are divisible between or among them, and that there is a reasonable basis for apportioning to one or more parties the harm they caused. Centerior Service Company v. Acme Scrap Iron & Metal Corporation, 153 F.3d 344, 348 (6th Cir. 1998) ("Given the nature of hazardous waste disposal, rarely if ever will a PRP be able to demonstrate divisibility of harm, and therefore joint and several liability is the norm."); Alcan-PAS, 990 F.2d at 722; Alcan-Butler Tunnel, 964 F.2d at 268; O'Neil, 883 F.2d at 178; Monsanto Co., 858 F.2d at 172; Kramer, 757 F. Supp. at 422; Stringfellow, 661 F. Supp. at 1060. A defendant's burden to prove a divisibility defense is substantial. Alcan-Butler Tunnel, 964 F.2d at 268-69; Hatco Corp., 836 F. Supp. at 1087; O'Neil, 883 F.2d at 183 (describing burden as "stringent").

Imposition of joint and several liability against ASARCO and the other defendants is especially appropriate here. The defendants are responsible for the widespread dumping of enormous quantities of tailings and other hazardous substances into a dynamic river system over many decades. The wastes have been commingled with those released by the other defendants and the wastes, and harms resulting therefrom, are indistinguishable.[19/]

The facts are not in dispute. Tailings disposed of by the defendants into the creeks and rivers of the Basin have been commingled in the environment so that releases from any one

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[19/]The United States does not contend that any defendant is liable for contamination upstream of its facilities, or on a tributary where the defendant had no facility. Each defendant is, however, liable for response costs at the facilities that it owned or operated and at all areas downstream of those facilities where the contamination has spread. In all areas where the trail of wastes moving downstream from the facility of one defendant crosses paths and commingles with the wastes flowing downstream from another defendant, each of those defendants should be jointly and severally liable for those commingled wastes.

company are intermixed and indistinguishable from releases from the others. Coeur SOF ¶¶ 48-50, 55. Defendants ASARCO and Hecla have admitted this. Coeur SOF ¶ 48. While adits, waste rock piles and unconfined tailings dumps can still be identified as discrete sources of waste, the huge volume of tailings released into the Basin have been carried downstream, mixed, deposited, and continuously reworked by flooding and seasonal high water. Coeur SOF ¶ 50. Tailings that washed downstream have become commingled in sediments and alluvium in flood plains and deposited on the beds and banks of rivers and lakes throughout the Basin. Coeur SOF ¶ 49. These deposited tailings have mixed with alluvium and continue to be remobilized by seasonal high water and floods, becoming redeposited elsewhere in the flood plain or further downstream. Coeur SOF ¶¶ 49-50. As a result of this cycle of remobilization and the mixing of releases from numerous sources, tailings have lost the original geochemical identities and ratios of elements that might have characterized the waste when it was originally released from a particular mill. Coeur SOF ¶ 51.

The sources of many other contaminants in the River system are no easier to identify. Because many of the mills processed ore from numerous mines, even confined tailings dumps may not contain deposits from an identifiable source. Coeur SOF ¶ 51. Upland soils historically contaminated by smelter emissions, fugitive dust emissions, waste storage, or windblown tailings have also become a part of the commingled waste released to the South Fork. Coeur SOF ¶ 51. Some adits that currently discharge water are draining the interconnected workings of more than one mine. Coeur SOF ¶ 54. In this case, the source of metals contained in the drainage, or of the acid that leaches the ore remaining in the underground workings, cannot be traced. As with

the mixing of tailings, discharges from numerous adits, seeps, and groundwater in contaminated flood plain deposits become mixed and inseparable in the surface water resource. Coeur SOF ¶ 54.

Moreover, geochemical conditions in areas to which each of these wastes have been transported are often different than the original geochemical conditions of the area from which the wastes were released. These differences have resulted in changes in the chemical form of metals and make it practically impossible to determine the exact origin of commingled wastes. Coeur SOF ¶¶ 52, 53. Because of the fundamental physical and chemical processes operating in sediments, surface water, groundwater, and soils of the Coeur d'Alene River Basin, metals concentrations and loadings at specific locations in the Basin cannot be ascribed to individual sources, and the contributions of any individual sources of waste to the overall environmental harm cannot be determined. Coeur SOF ¶ 55. Given the commingled state of the tailings and other hazardous substances released into the environment in the Basin and the inability to trace them to any source, defendants cannot establish any reasonable basis for apportioning liability among themselves.

The Ninth Circuit has already affirmed a finding that mining companies operating in the Basin were jointly and severally liable for injuries to a farmer's property along the Coeur d'Alene River caused by mine wastes. Those wastes, many of which are likely still in the Basin today, were disposed into the South Fork and carried downstream by the river. In Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak, 7 F.2d 583 (9th Cir. 1925), the Ninth Circuit held that the evidence presented at trial supported the district court's decision holding the defendant

mining companies jointly and severally liable for damage done to the farmer's property. Assessing the evidence, the Ninth Circuit stated:

> It shows beyond question that the defendants each contributed to that injury by discharging into common waters the poisonous debris from their mining operations, and that there was a common design and joint and co-operative action, in that in constructing dams to impound such debris the defendants acted together, and for their common protection secured releases from farmers for damages resulting from their mining operations and maintained an organization, in which they acted as a unit, for the disposition of such debris. Convincing in this respect was the record in this court in the case of McCarthy v. Bunker Hill & Sullivan Mining Co., 164 F. 927, 92 C.C.A. 259 In that case these defendants were parties defendant, and in their sworn answer they set up their joint action in purchasing large tracts of land, and in constructing and maintaining two dams for the express purpose of impounding the tailings from their mines, to which construction and maintenance, as the answer alleged, each defendant had contributed his share of the cost thereof.

Id. at 586. In affirming joint and several liability, the Ninth Circuit in Polak applied the same principle applied by courts today in multi-party CERCLA suits: "where the negligence of two or more persons concur in producing a simple, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert of action." Polak, 7 F.2d at 584.

ASARCO faces the same legal liability under CERCLA today that the Ninth Circuit imposed on the Basin's mining companies in 1925. The facts relating to these defendants' decades-long contamination of the Basin present no basis for apportioning the harm caused by their toxic wastes. Accordingly, ASARCO and the other defendants should be held jointly and severally liable for the costs of cleaning up hazardous substances in all areas of the Basin where those wastes have commingled with the wastes released by other defendants.

IV. ASARCO DOES NOT HAVE ANY AFFIRMATIVE DEFENSES TO LIABILITY

The Ninth Circuit has held that CERCLA expressly limits the available defenses to those that are statutorily provided, and further held that those few defenses are to be strictly construed. Hanna Mining, 882 F.2d at 396 ("Exceptions to CERCLA liability should, therefore, be narrowly construed"); Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1316-17 (9th Cir.1986); Shell Oil, 841 F. Supp. at 970 ("With CERCLA's basic remedial purpose in mind, the Court narrowly construes the defenses provided under section 107(b)"); see Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 286 (N.D. Cal. 1984) (contrasting "extremely limited" defenses under section 107(b) with "extremely broad" scope of liability under section 107(a)).[20]

ASARCO has attempted to avail itself of the three defenses set forth in Sections 107(b)(1)-(3) of CERCLA, and to the federally permitted release defense in Section 107(j). As discussed below, ASARCO cannot avoid its liability because, as a matter of undisputed fact, it cannot show that it is entitled to any of the four alleged defenses. The United States incorporates by reference and respectfully refers the Court to the Coeur d'Alene Tribe's memorandum of law in support of its motion for partial summary judgment against the defendants for a discussion of the act of God and act of war defenses.

With regard to the third-party defense set forth in Section 107(b)(3) of CERCLA, ASARCO cannot meet its burden to show that the releases of any hazardous substances were

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[20]Thus, to the extent ASARCO has asserted affirmative defenses other than those set forth in the statute, the United States moves for summary judgment as to those defenses, and refers the Court to its previously filed motion to strike affirmative defenses for the discussion therein (filed April 30, 1997).

caused "solely" by the act or omission of a third party not in a contractual relationship with ASARCO. The "sole cause" requirement is narrowly construed by courts, and parties asserting the "third party" defense must establish that they played no role contaminating the site in question. Louisiana-Pacific Corp. v. Asarco, Inc., 735 F. Supp. 358, 363 (W.D. Wash.1990) ("third party" defense not available where the party asserting it "may have contributed to the contamination..., even minimally"); Stringfellow, 661 F. Supp. at 1061 ("third party" defense not available where there were "multiple causes" of the release of contaminants, only some of which may be attributable to third parties). Likewise, ASARCO cannot show that its releases were caused solely by an act of war or act of God as required by Section 107(b), given the extensive releases of hazardous substances for which they are responsible.

Next, according to CERCLA, "[r]ecovery by any person for response costs or damages resulting from federally permitted releases shall be pursuant to existing law in lieu of this section." 42 U.S.C. § 9607(j). The Section 107(j) exemption is a narrow defense, which applies only to specifically and expressly permitted releases:

> to the extent damage was caused by releases which were not expressly permitted in the various permits, which exceeded the limitations established by the permits or which occurred during a time period when there were no permits, then the [plaintiff] may seek recovery for those damages under the CERCLA statute.

Bunker Hill Co., 635 F. Supp. at 674.

A defendant who claims the 107(j) exemption bears the burden of proving which releases are federally permitted and what portion of the damages are allocable to the federally permitted releases. Lincoln Properties, Ltd., 36 ERC at 1247-48 (holding that PCE discharges into sewers, and subsequent leaking to soil and groundwater were not within the federally permitted release

exclusion for discharges into publicly-owned treatment works); In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 722 F. Supp. 893, 896-97 (D. Mass. 1989). In Iron Mountain Mines, Inc., 812 F. Supp. at 1540-41, the court stated that recovery of response costs "is prevented only where defendant proves that the injury is divisible," and found that Rhone-Poulenc had failed to offer evidence that the injury in that case could "be attributed in measurable proportion to permitted releases." Therefore, even though a federal Clean Water Act permit governed several years of the discharge of metals from two copper plants at Iron Mountain, the court granted summary judgment in favor of the United States on the 107(j) defense. Id.

Only those few permits that are specifically defined in Section 101(10) of CERCLA entitle a defendant to invoke the Section 107(j) defense. See Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1231 (E.D. Pa. 1993) ("Section 9607(10) defines `federally permitted release' in an extraordinarily detailed manner.").[21/] State permits, oral authorizations, applications for permits, or permits that do not cover a specific discharge do not rise to the level of a federally permitted release. In order to prevail on this exemption, ASARCO must prove which releases of both lead, zinc, and cadmium were pursuant to validly issued federal permits of the type enumerated in Section 101(10) of CERCLA, and must prove that the costs of

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[21/]By definition, a federally permitted release must be pursuant to a permit issued under one of the following federal environmental statutes: the Clean Air Act, 42 U.S.C. §§ 7401-7671q; the Clean Water Act, 33 U.S.C. §§ 1251-1387; the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k; or the Safe Drinking Water Act, 42 U.S.C. §§ 300f- 300j-26, or be the injection of fluids for petroleum production pursuant to state permit, or releases of nuclear material regulated by the Atomic Energy Act of 1954.

responding to those releases are divisible from other non-permitted releases. They have not even attempted to do so.

With respect to the four permitted defenses, ASARCO has failed to set forth any evidence that would permit this Court to sustain its assertion that its has any defense to liability. Thus, summary judgment on behalf of the United States is now appropriate. See High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990) (summary judgment appropriate when movant negates essential elements of a claim or demonstrates the insufficiency of evidence supporting that claim); British Airways Bd. v. Boeing Co., 585 F.2d 946, 954 n.12 (9th Cir. 1978).

CONCLUSION

Based on defendant's admissions and other undisputed factual information discussed above, the United States respectfully requests that this Court grant its motion for partial summary judgment declaring defendant ASARCO either solely or jointly and severally liable for response costs incurred and to be incurred addressing hazardous substances in the following areas in the Coeur d'Alene Basin:

- Canyon Creek from ASARCO's uppermost mining-related property addressed in this motion, the Tiger-Poorman Properties, to the confluence with the South Fork, as well as the flood plain of Canyon Creek;
- The South Fork from ASARCO's Morning Properties in Mullan downstream to its terminus at the confluence with the North Fork, including the flood plain of the South Fork (outside the Bunker Hill Superfund Site);
- The Main Stem Coeur d'Alene River, including its flood plain, Cataldo Flats, and the wetlands and Lateral Lakes adjacent to the main stem; and
- The Delta of the Coeur d'Alene River and Lake Coeur d'Alene.

The United States is also seeking partial summary judgment as to those elements of liability for natural resource damages under Section 107(a) of CERCLA that are the same as the elements of liability for response costs, as explained above in footnote 3.

Respectfully Submitted,

Attorneys for Plaintiff United States

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division

Kathryn C. Macdonald

TOM C. CLARK, II, Senior Counsel
THOMAS W. SWEGLE, Senior Lawyer
KATHRYN C. MACDONALD, Trial Attorney
Environmental Enforcement Section
1425 New York Avenue, N.W.
Washington, DC 20005
(202) 353-7397

MARC HAWS
Assistant U.S. Attorney, District of Idaho
P.O. Box 32
Boise, ID 83707
(208) 334-1211

Of Counsel:

Barry Stein
Assistant Regional Solicitor
U.S. Department of the Interior

Cliff Villa
Assistant Regional Counsel
U.S. Environmental Protection Agency

Steve Silverman
Attorney Advisor
U.S. Department of Agriculture

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